



Crl.A.No.79 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.04.2024

CORAM :

THE HON'BLE MR. JUSTICE M.S.RAMESH

AND

THE HON'BLE MR. JUSTICE SUNDER MOHAN

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Vijayan

... Appellant/sole Accused

v.

State represented by
Inspector of Police
Sathyamangalam Police Station,
Erode District.
(Crime No.6 of 2017)

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Code of Criminal Procedure, 1973, against the conviction of the appellant and sentence in Spl.S.C. No.5 of 2018 dated 11.09.2018, on the file of the learned Additional Sessions Judge, Mahalir Neethi Mandram (Mahalir Fast Track Court), Erode and set aside the conviction and sentence imposed in judgment dated 11.09.2018



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and acquit the appellant.

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For Appellant : Mr.T.Muruganantham
For Respondent : Mr.Babu Muthu Meeran
Additional Public Prosecutor

JUDGMENT

(Order of the Court was made by SUNDER MOHAN,J.)

This Criminal Appeal has been filed by the sole accused challenging the conviction and sentence imposed upon him vide judgment dated 11.09.2018 in Spl.S.C.No.5 of 2018 on the file of the learned Additional Sessions Judge, Mahalir Neethi Mandram (Mahalir Fast Track Court), Erode.

2.(i) It is the case of the prosecution that the victim PW3 was aged 10 years at the time of occurrence; that on 29.07.2017, while she was playing the appellant who was her neighbour with the intention to commit sexual assault called her into his house under the guise of changing the TV channel with the consent of PW1; that when the victim came to the house, he locked the house; that he removed her nighty and undergarments, removed his lungi and made the child sit on his private part; and thereby committed the



offence under Section 4 of the Protection of Child from Sexual Offences Act (hereinafter referred to as 'POCSO Act').

(ii) It is the further case of the prosecution that after the said occurrence, the victim came crying to her house and PW1 enquired her and came to know about the incident; that since the victim was not a normal child and had slight mental retardation, she did not want to make any issue; that however, on the advice of the elders in the village, she gave a complaint (Ex.P1) on 04.08.2017. PW16, the Sub-Inspector of Police received the complaint and registered an FIR [Ex.P22] in Cr.No.6 of 2017 against the appellant for the offence under Section 12 of the POCSO Act.

(iii) PW17, the Inspector of Police, took up the investigation, went to the scene of the occurrence and prepared the Observation Mahazar [Ex.P14], Rough Sketch [Ex.P23] and examined the witnesses. On 06.08.2017 at about 6.00 p.m., he arrested the appellant and on the basis of the confession and on the medical report, he altered the offence to Section 4 of the POCSO Act and sent the alteration report-Ex.P24. He thereafter



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made arrangements to record the Section 164 Cr.P.C. statement of the victim, which was recorded by the learned Judicial Magistrate No.1, Gobichettipalayam. He examined the other witnesses and filed a final report against the appellant under Section 4 of the POCSO Act and Section 366 of the IPC before the learned Additional Sessions Judge, Mahalir Neethi Mandram, (Mahalir Fast Track Court), Erode, which was taken on file as Special S.C.No.5 of 2018.

(iv) On the appearance of the appellant, the provisions of Section 207 Cr.P.C., were complied with and the trial Court framed charges against the appellant, and when questioned, the appellant pleaded 'not guilty'.

(v) To prove the case, the prosecution examined 17 witnesses as P.W.1 to P.W.17 and marked 26 exhibits as Exs.P1 to P26. When the appellant was questioned, u/s.313 Cr.P.C., on the incriminating circumstances appearing against him, he denied the same. The accused did not examine any witnesses or mark any documents. Series of X-rays, were marked as Court documents [Ex.C1]



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(vi) On appreciation of oral and documentary evidence, the trial Court found that the prosecution had established its case beyond reasonable doubt and held the appellant guilty of offence under Section 4 of the POCSO Act and Section 366 of the IPC. The appellant was convicted and sentenced as follows:

<i>Offence under Section</i>	<i>Sentence imposed</i>
366 IPC	To undergo RI for 10 years and to pay a fine of Rs.10,000/- in default to undergo SI for 1 year.
4 POCSO Act	To undergo life imprisonment and to pay a fine of Rs.10,000/- in default to undergo SI for 1 year.
The sentences were directed to run concurrently.	

Hence, the appellant has preferred the appeal challenging the said conviction and sentence.

3. Heard, Mr.T.Muruganantham, learned counsel appearing for the appellant, and Mr. Babu Muthu Meeran, learned Additional Public Prosecutor appearing for the respondent/State.

4. The learned counsel for the appellant submitted primarily that the complaint is belated and the evidence suggests that there was prior enmity



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between the family of the victim and the appellant which had prompted PW1 to give a false complaint; that in any case, the allegations do not disclose the offence under Section 4 of the POCSO Act and prayed for acquittal.

5. The learned Additional Public Prosecutor *per contra* submitted that though the accused was charged and convicted for the offence under Section 4 of the POCSO Act, he is liable to be convicted under Section 6 of the POCSO Act, because the appellant had committed aggravated penetrative sexual assault; that the motive for false prosecution has not been probalised by the defence; and that the evidence of PW1 and PW3 are cogent and the trial Court had rightly convicted the appellant and no interference is called for.

6. We have carefully considered the rival submissions and have perused all the relevant records.

7. PW1, is the mother of the victim; PW2 is the Doctor who certified



that the victim had a very minor mental disability, which could be assessed at 40% to 42% and that she was capable of understanding and answering the questions; PW3 is the victim; PW4 is the Headmistress of the School, where the victim studied and had produced the school certificate [Ex.P8], which revealed the date of birth of the victim as 26.10.2007; PW5 is an officer who worked in Sathyamangalam Municipality and had produced the Birth Certificate [Ex.P10] of the victim; PW6 is the Doctor who had examined the victim and made entries in Ex.P12-Accident Register and gave the final opinion Ex.P13; PW7 is the relative of the victim and a hearsay witness; PW8 is a neighbour and heard about the incident from PW1; PW9, is a neighbour who came to know of the occurrence from PW1 on 29.07.2017; PW10 is the Thasildar, who issued Ex.P16-certificate to show that the victim belonged to Scheduled Caste community; PW11 is the father of the victim who speaks about PW1 telling him about the incident and their giving a complaint to the police; PW12 is the Doctor who made entries in Ex.P18-Accident Register and gave final opinion-Ex.P19; PW13, is the doctor who had certified that the victim's age could be between 10 and 11 years and issued Ex.P21-Certificate to that effect; PW14 and PW15 are the



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Constables, who had assisted in the investigation; PW16 is the Sub-Inspector of Police, who registered the FIR; and PW17 is the Investigating officer, who filed the final report.

8. Though the occurrence took place on 29.07.2017, the complaint was lodged only on 04.08.2017. In a case of this nature, delay in lodging the complaint by itself would not make the witnesses unreliable. Admittedly, the victim suffered mental disability and therefore PW1's hesitation to give a complaint immediately is not unnatural. That apart, PW1 had informed about the occurrence after her daughter complained to her to the neighbours viz., PW8 and PW9. PW11 father of the victim also had explained as to why they decided to give a complaint. He had stated that the child was crying continuously and was complaining about the incident. Therefore, the delay in giving the complaint would not be fatal to the prosecution case.

9. PW2, the Doctor who had examined PW3 had opined that the victim was capable of understanding the question and answering them



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cogently without the assistance of any teacher or interpreter, to explain the questions to her. The trial Court before examining PW3 had conducted a *voir dire* test to ascertain the competency of PW3 to depose. The questions put by the trial Judge and the answers given by the victim during the *voir dire* questioning suggests that the victim was capable of understanding questions and answering cogently, which is acknowledged and endorsed by the trial Court in the deposition. That apart the chief and cross examination also would suggest that the victim had understood the questions and answered the same, cogently. The victim has narrated the incident in her deposition which had been recorded in question and answer form. The relevant portion of her evidence is extracted for better appreciation of her evidence.

“கேள்வி :- அப்புறம் என்னாயிற்று பாப்பா?
பதில் :- ஜட்டி, பாவாடையை அந்த மாமா கழற்றினார்.
கேள்வி :- பிறகு என்னாயிற்று?
பதில் :- மாமா பிறகு என் மேல் படுத்தார்.
கேள்வி :- வேறு என்ன நடந்தது?
பதில் :- பிறகு குடிக்கலாம் என்று சொன்னார்.
கேள்வி :- பிறகு என்ன நடந்தது?
பதில் :- பிறகு அம்மா கதவைத் தட்டினார்.
கேள்வி :- பிறகு என்ன நடந்தது?”



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பதில் :- அம்மா எல்லார்கிட்டயும் நடந்ததை சொன்னார்.”

The above deposition would suggest that the ingredients of penetrative sexual assault have not been made out besides being contrary to the prosecution case spelt out in the charge.

10. After the above answers, the prosecution sought permission under Section 154 of the Indian Evidence Act, to put questions that an adverse party can put in cross examination, which was permitted by the learned Judge. However, the prosecution could not elicit any further fact to suggest penetrative sexual assault. In the questions put by the learned Public Prosecutor under Section 154 of the Indian Evidence Act, the victim was however asked if she had given Section 164 Cr.P.C. statement and she confirmed having given the statement and also identified her signature in the statement. We may point out here that the version in Section 164 Cr.P.C. statement is also contrary to the charge and the deposition in the Court. Further, the entries made in the Accident Register [Ex.P12] reads as follows:

“H/o. attempted rape”



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11. Though PW1 would state that she saw both the victim and the appellant nude and thereafter, when she examined the victim she found that the victim had suffered an injury in her private part, the Doctor who had examined her and issued Accident Register-Ex.P12, did not find any external injuries. That apart PW11, would state that the victim was taken to the hospital the day after the occurrence, even before the complaint was lodged and the Doctor had examined the victim. This aspect has not been spoken to by PW1. The prosecution has suppressed this aspect.

12. Be that as it may. In view of the findings in Ex.P12-Accident Register that there was an 'attempted rape' and no external injuries were found on the victim, delay in filing of the complaint and the fact that victim's evidence does not clearly establish that there was a penetrative sexual assault, we are of the view that it would be highly unsafe to convict the appellant for the offence under Section 4 or 6 of the POCSO Act. However, we find that the evidence suggests that the appellant had committed sexual assault, which involved physical contact with the private



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part of the victim and also physical contact of the victim with the private part of the appellant. The victim was aged 10 years at the time of occurrence and therefore, the act committed by the appellant would be a aggravated sexual assault falling within Section 9(m) of the POCSO Act, which is punishable under Section 10 of the POCSO Act.

13. Considering the fact that the victim was not a normal child and the fact that the appellant had taken undue advantage to commit the aggravated sexual assault, we are of the view that the appellant deserves to be sentenced to undergo a rigorous imprisonment for a maximum period of seven years prescribed under the Act.

14. It is the case of the prosecution that the victim was kidnapped with the intent that she may be forced to illicit intercourse. In order to attract the offence of kidnapping the prosecution has to establish the ingredients of the offence under Section 361 of the IPC, which reads as follows:



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361. Kidnapping from lawful guardianship.—

Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.— The words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.— This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

The enticement or taking away of the minor child has to be done without the consent of the lawful guardian. Admittedly, the appellant had taken the victim with the consent of PW1. In such circumstances, we are of the view that the offence of kidnapping is not made out and consequentially the offence under Section 366 of the IPC is also not made out. Therefore, we set aside the judgment of conviction as regards the finding of guilt under Section 366 of the IPC.



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15. In the result, the Criminal Appeal is Partly Allowed. The judgment of conviction and sentence dated 11.09.2018 made in Spl.S.C.No.5 of 2018 on the file of the learned Additional Sessions Judge, Mahalir Neethi Mandram (Mahalir Fast Track Court), Erode, is modified as follows:

(i) The appellant is convicted under Section 10 r/w 9(m) of the POCSO Act instead of Section 4 of the POCSO Act and sentenced to undergo seven years rigorous imprisonment and to pay a fine of Rs.10,000/- in default to undergo simple imprisonment for one year;

(ii). The conviction and sentence imposed upon the appellant by the trial Court for the offence under Section 366 of the IPC is set aside; and

(iii) It is directed that the period of sentence already undergone by the appellant shall be set off under Section 428 Cr.P.C.

(M.S.R.,J.) (S.M.,J.)



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Index : yes/no
Speaking /Non-speaking order
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M.S.RAMESH,J.

AND

SUNDER MOHAN,J.

ars

To

1. The Additional Sessions Judge, Mahalir Neethi Mandram
(Mahalir Fast Track Court),
Erode.

2. The Inspector of Police,
Sathyamangalam Police Station,
Erode District.

3. The Superintendent,
Central Prison, Coimbatore.

4. The Public Prosecutor,
High Court, Madras

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